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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1071

ARKANSAS LOUISIANA GAS CO.,
Petitioner,

v.

A. D. LUSTER; DAVID WILKINS AND MIKE KINARD; FARMER'S SEAFOOD CO., INC.; BANK OF NORTHEAST ARKANSAS; FIRST NATIONAL BANK OF POINSETT COUNTY; FIRST SECURITY BANK OF SEARCY; PAUL L. SIMPSON and NORMA SIMPSON,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioner, Arkansas Louisiana Gas Co., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on September 19, 1979.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. Rehearing en banc and rehearing were denied September 19, 1979. The District Court opinion is Reported as *Equifax, Inc.* v. *Luster,* 463 F. Supp. 352 (E.D. Ark. 1978).

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on September 19, 1979 in the District Court. This

petition is filed within 90 days of that date. This Court's jurisdiction is invoked under Supreme Court Rule 19(1)(b). Jurisdiction in the courts below was predicated on 28 *U.S.C.* § 1335.

QUESTION PRESENTED

Is a judgment debtor subject to garnishment of the judgment under Arkansas law?

STATUTORY PROVISIONS INVOLVED

Ark. Stat. Ann., § 30-901 (1962 Repl.):

> After an execution of fieri facias directed to the county in which the judgment was rendered, or to the county of the defendant's residence, is returned by the proper officer, either as to the whole or part thereof, in substance, no property found to satisfy the same, the plaintiff in the execution may institute an action, by equitable proceedings, in the court from which the execution issued, or in the court of any county in which the defendant resides, or is summoned, for the discovery of any money, chose in action, equitable or legal interest, and all other property to which the defendant is entitled, and for subjecting the same to the satisfaction of the judgment; and in such actions, persons indebted to the defendant in the execution, or holding the money or property, in which he has an interest, or holding the evidence or securities for the same, may be also made by defendants.

Ark. Stat. Ann., § 31-501 (1962 Repl.):

> In all cases where any plaintiff may begin an action in any court of record, or before any justice of the peace, or may have obtained a judgment before any of such courts, and such plaintiff shall have reason to believe that any other person is indebted to the defendant, or has in his hands or

> possession goods and chattels, moneys, credits and effects belonging to such defendant, such plaintiff may sue out a writ of garnishment, setting forth such claim, demand or judgment, and commanding the officer charged with the execution thereof to summon the person therein named, as garnishee, to appear at the return day of such writ and answer what goods, chattels, moneys, credits and effects he may have in his hands or possession belonging to such defendant to satisfy said judgment, and answer such further interrogatories as may be exhibited against him; provided, if the garnishment be issued before the judgment, the plaintiff shall give bond in double the amount for which the garnishment is issued, and he will pay the defendant all damages that he may sustain by the wrongful bringing of his suit or the issuing of the garnishment.

STATEMENT OF THE CASE

On December 10, 1976, A.D. Luster, one of the respondents here, recovered a judgment in the United States District Court for the Eastern District of Arkansas against Equifax, Inc. After appellate review and the filing of a remittitur on June 15, 1978, the principal amount of the judgment was reduced from $150,000 to $50,000. All of the other respondents here (except First National Bank of Poinsett County) obtained judgments against Luster between October 22, 1975 and May 18, 1977. In order to satisfy their judgments against Luster, these respondents attempted to garnish the fund Equifax held as judgment debtor of Luster. Writs of garnishment were served on Equifax and/or the district clerk on behalf of all respondents (except Luster) between December 15, 1976 and October 10, 1978. The petitioner, Arkansas Louisiana Gas Co., also recovered a judgment against Luster and in order to enforce it, instituted suit in the Chancery Court of Craighead County, Arkansas, Western District on June 14, 1978, in accordance with the method prescribed for enforcing such judgments, as

stated in *Ark. Stat. Ann.*, § 30-901 (1962 Repl.). Both Luster and Equifax were named defendants; attachment issued and was served on Equifax.

Meanwhile, in order to protect itself from the multiple claims of its creditor's creditors, Equifax filed a federal interpleader action to determine the priority of claims, naming as defendants all of the respondents here and the petitioner. Bond was posted in the amount Equifax owed as a judgment debtor of Luster. The district court determined that payments from the fund held by Equifax should first be made to attorneys for Equifax and then to attorneys for Luster. Priority after payment of attorney fees and costs depended on whether Arkansas law allowed garnishment of a judgment debtor (the enforcement method chosen by the respondents against Luster), or whether the petitioner, as the only party to file a creditor's suit joining Equifax, in order to enforce its judgment against Luster, had priority over the claims of the respondents. Without trial or oral argument, the district court judge decided the garnishments were valid under Arkansas law and awarded the remainder of the fund to the Bank of Northeast Arkansas, Farmer's Seafood Company and David Wilkins and Mike Kinard, in the order in which their writs of garnishment were served on Equifax. No money remained to satisfy the claims of the other garnishors or of the petitioner.

Without oral argument, the Court of Appeals affirmed on the basis of the opinion of District Court Judge Richard S. Arnold. A petition for rehearing en banc was denied and the petitioner now seeks review by way of certiorari.

REASON FOR GRANTING THE WRIT

The Court of Appeals Affirmed a District Court Decision Based on an Interpretation of Arkansas Law Which Was In Direct Conflict With The Last Statement of the Arkansas Supreme Court on the Same Substantial Issue. The State Supreme Court Decision Was Unequivocal and Very Recent. A Writ Should Be Granted Under This Court's Rule 19 to Review the Erroneous Federal Decision of a State Law Issue.

The only issue which the Court of Appeals considered in this case, and the only issue this Court need consider if it grants certiorari, is whether the district court correctly applied Arkansas law on the validity of garnishments against judgment debtors. *See* S. Ct. Rule 19(1)(b). The petitioner argues that District Judge Arnold erroneously interpreted a recent Arkansas Supreme Court case which affirmed an Arkansas rule to the effect that a judgment debtor (in this case, Equifax) is not subject to the process of garnishment of the judgment. Judge Arnold then impermissibly anticipated that, if presented with the facts of this case, the state supreme court would decline to follow a rule which it had followed for 135 years and had just recently affirmed.

The petitioner argued below that its claim to the interpleaded fund was prior in time to the claims of the garnishor-respondents, because it was the only party to follow the correct procedure for establishing a lien on the funds, the garnishments being invalid under Arkansas law. The rule that judgment debtors are not subject to garnishment of the judgment was established in *Trowbridge & Jennings* v. *Means,* 5 Ark. 135 (1843). The *Trowbridge* court held that the garnishment statute (an almost identical precursor to the present statute, *Ark. Stat. Ann.*, §31-501 (1962 Repl.)), because it was in derogation of the common law, must be strictly construed, and while its general language might be broad enough to allow garnishment of a judgment debt, it should not be so construed. The reason given

was that if garnishment were allowed against a judgment debt upon which execution could issue, the garnishee-judgment debtor could be exposed to multiple liability and might be forced to resort to the expense of instituting an equity proceeding to avoid the harassment of multiple claimants to his judgment debt.

The principles of *Trowbridge* were quickly affirmed in *Fowler* v. *McClelland,* 5 Ark. 188 (1843), in which the supreme court reversed a judgment against the administrator of an estate. The judgment has been based on garnishment of a dividend which a probate court had found the administrator owed to the garnishor's judgment debtor. The supreme court viewed the administrator as a judgment debtor as well and invoked *Trowbridge, supra.* Shortly thereafter, *Trowbridge* was reaffirmed in *Tunstall* v. *Means,* 5 Ark. 700 (1843).

More than thirty years later, the state supreme court had occasion to reexamine *Trowbridge* and *Tunstall* and upheld those decisions. *St. L., I.M. & S. Ry. Co.* v. *Richter,* 48 Ark. 349, 3 S.W. 57 (1887), decided a question which had been raised in *Trowbridge,* but, because it was unnecessary to a decision in that case, had been left unanswered. Richter had obtained a default judgment against the railroad before a justice of the peace. On the following day, the judgment was superseded when the railroad appealed to the circuit court for a trial de novo. Before trial, a judgment creditor of Richter attempted to garnish the railroad to satisfy its judgment against Richter. The court ruled that "the pendency of a suit for the collection of a debt does not place it beyond the reach of the garnishment process," 48 Ark. at 353, thus clearing up the question *Trowbridge* had left open. Garnishment was allowed because there was no judgment, it having been superseded, but only an action pending in the circuit court for collection of a debt.

In 1972, the Arkansas Supreme Court, in deciding what was primarily a secured transactions case under the Uniform Commercial Code, reaffirmed the rule of *Trowbridge* and *Tunstall.* In *McIlroy Bank* v. *First National Bank of Fayetteville,* 252 Ark. 558, 480 S.W.2d 127 (1972), the court flatly rejected any notion that the *Richter* case in 1887 had in any way limited the rule established in 1843, explaining that *Richter* had not involved a final judgment.

In the instant case, however, District Court Judge Arnold totally misconstrued the *McIlroy* case. He reasoned that *Trowbridge* and *Tunstall* were not applied in *Richter* for the very general reason that the railroad was protected from double liability, and that *McIlroy* should be read as affirming the notion that whenever a judgment debtor is protected from double liability, garnishment of the judgment is valid. This view cannot be supported by a fair reading of *McIlroy.* That case simply affirmed the rule that judgment debts cannot be garnished and noted that *Richter* had not dealt with a judgment debt.

If Judge Arnold's views on garnishment of judgment debts become law in Arkansas, the law in the area of debtor-creditor rights will become confused, unpredictable and inconsistent. Under his view, if a judgment debtor goes to the expense of protecting himself from multiple liability by filing an interpleader action or instituting other equity proceedings, then garnishments issued against him will be valid. However, if he cannot or does not so protect himself, then under Judge Arnold's view the reason for the rule of *Trowbridge* and *Tunstall* would still apply and the garnishments would be invalid. But the validity of the garnishment of judgment debts cannot be decided on a case-by-case basis, after their issuance, depending on whether a particular judgment debtor has been clever enough or wealthy enough to protect himself from multiple liabiltiy by filing an interpleader or other equitable action. Arkansas law requires more certainty and predictability. Creditors need to know before a court battle whether garnishment of a judgment debt is a valid method of enforcing their own judgments, and debtors

deserve equal protection of the law, regardless of whether they have the wherewithal to protect themselves from multiple liability. The reason for the rule of *Trowbridge* and *Tunstall* is still sound, especially in Arkansas, where law and equity have not been merged. Judge Arnold's view would leave judgment debtors little choice when garnished but to seek protection in an equity court. The rule was established specifically to protect judgment debtors from such necessity. As the Arkansas Supreme Court stated so succinctly in explaining its principal ground of decision in *Trowbridge, supra:*

> [S]uch judgment debtor would be always compelled to submit to great vexation and harassment, and in many instances be forced to result to a court of equity for protection, if such proceeding by garnishment against him was allowed.

Fowler, supra, 5 Ark. at 189.

In the instant case, Judge Arnold was correct in stating that the federal court could protect the judgment debtor, Equifax, from multiple claims by its resolution of all claims in the interpleader action. But Equifax filed the interpleader action largely because several claims were pending against it by way of garnishment and the validity of such garnishments was in doubt. However, the rule upheld by the supreme court in 1972 was fashioned precisely to avoid the necessity for such action. There is no reason to believe the supreme court would have changed its mind just six years later in 1978 had it been presented with the facts of the instant case, and it was impermissible for Judge Arnold to speculate that it would do so.

CONCLUSION

This Court stated in *Huddleston* v. *Dwyer,* 322 U.S. 232, 237 (1944): '[O]rdinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts." A writ of certiorari should issue to the Eight Circuit to review the judgment and opinion in the present, exceptional case. The summary opinion of the Court of Appeals, frankly based on the District Court opinion, was not a "considered determination" of the important state law question. The District Court decision was clearly erroneous, and Judge Arnold's opinion may well have been colored by his stated views that the validity of the garnishments should probably be decided under federal, rather than state, law.

Respectfully submitted,

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APPENDIX

APPENDIX A

United States Court of Appeals
For the Eighth Circuit

No. 79-1110

Arkansas Louisiana Gas Co.
Appellant,

v.

A.D. Luster, David Wilkins and Mike Kinard, Farmer's Seafood Company, Inc.; Bank of Northeast Arkansas; First National Bank of Poinsett County; First Security Bank of Searcy; Paul L. Simpson and Norma Simpson,
Appellees.

Appeal from the United States District Court for the Eastern District of Arkansas

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Submitted: August 10, 1979
Filed: August 22, 1979

Before HEANEY, ROSS and McMILLIAN, Circuit Judges.

PER CURIAM.

This is an appeal by Arkansas Louisiana Gas Co. (Ark. Gas) from a judgment rendered in an interpleader action in the United States District Court for the Eastern District of Arkansas, Judge Arnold, presiding. Jurisdiction in the lower court was predicated on 28 U.S.C. §1335.

In December of 1976, A.D. Luster obtained a judgment against Equifax, then known as Retail Credit Company. That judgment was affirmed by the court in *Luster* v. *Retail Credit Co.*, 575 F.2d 609 (1978) upon the condition of a remittitur reducing the judgment from $150,000 to $50,000. *Id.* at 619-20. The remittitur was filed on June 15, 1978. *See Equifax, Inc.*, v. *Luster,* 463 F.Supp. 352, 353, (E.D. Ark. 1978). Between December of 1976 and June 15, 1978, various judgment creditors of A.D. Luster attempted to enforce their judgments against him by garnishing the fund held by Equifax. Ark. Gas chose to establish its lien on the fund by a creditor's suit it instituted in a court of chancery on June 14, 1978. *See* ARK. STAT. ANN. §30-901 (1962). On June 23, 1978, Equifax instituted an interpleader action under 28 U.S.C. § 1335, joining Luster and his judgment creditors as defendants.

The district court treated the pleadings as a motion for summary judgment, and awarded priority first to attorneys for Equifax, and then to attorneys for Luster. The court allocated the remainder of the fund to three judgment creditors whose writs of garnishment had been served prior to the time Ark. Gas filed its creditor's suit. Since those claims were sufficient to exhaust the interpleaded fund, Ark. Gas was not included in the order distributing the fund.

Ark. Gas argues in this appeal that (1) the priorities among the parties should have been determined under Arkansas law, and (2) that according to the principles established in Arkansas case law, Ark. Gas was entitled to priority over all other claimants to the fund.

The first issue can be disposed of with dispatch. Although Judge Arnold indicated that the result in this case would have been the same under principles of federal decisional law, he based his decision upon his interpretation of Arkansas law.

Since Ark. Gas argues that it alone followed the correct procedure for establishing a lien on the funds, the sole issue before this court is whether the district court was correct in concluding that the Supreme Court of Arkansas would uphold the validity of the garnishments upon the facts of this case. We have carefully examined the briefs of the parties and the record and affirm on the basis of Judge Arnold's well-reasoned opinion.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

In the United States Court of Appeals
For the 8th Circuit

Arkansas Louisiana Gas Co.,
Plaintiff

v.

A.D. Luster, et al
Defendant

NO. 79-110

NOTICE OF APPEAL

Notice of appeal is hereby given by Arkansas Louisiana Gas that it will appeal the judgment entered on the 21st day of September, 1979, in the United States District Court, Eastern District of Arkansas, Jonesboro Division, on appeal from the United States Court of Appeals for the 8th Circuit in so far as the judgment denies the priority of the lien of Arkansas Louisiana Gas Company under Supreme Court Rule 10 (2) and (3), and 19 (1)(b).

Dated this 28th day of December 1979.

Anthony W. Bartels
Attorney at Law
316 S. Church
Jonesboro, AR 72401

CERTIFICATE OF SERVICE

I, Anthony W. Bartels, do hereby certify that I have mailed a copy of the above and foregoing Notice to all of the attorneys of record by placing same in the US Mail, postage prepaid, properly addressed on this 28 day of December, 1979.